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No. 1216

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

ARTHUR C. ALLYN, JR.

Petitioner,

v.

ROBERT J. FLANNERY AND WILLIAM MOORE

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

THOMAS R. MULROY
EDWARD W. ROTHE
Counsel for Petitioner

HOPKINS, SUTTER, OWEN, MULROY, WENTZ & DAVIS
One North La Salle Street
Chicago, Illinois 60602
FInancial 6-3900

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

Petitioner, Arthur C. Allyn, Jr., prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District, affirming libel judgments based on jury verdicts of $10,000 for each respondent-police officer entered by the Circuit Court of Cook County, Illinois, First Municipal District.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, reproduced in the Appendix, is officially reported at 75 Ill. App. 2d 365 and unofficially reported at 221 N.E. 2d 89.

JURISDICTION

The judgment of the Appellate Court of Illinois was dated and entered on October 6, 1966. On November 30, 1966, a timely petition for leave to appeal was filed in the Supreme Court of Illinois. On January 18, 1967, the Supreme Court of Illinois denied the petition for leave to appeal, making the Appellate Court's judgment that of the highest court of the State of Illinois in which a decision could be had.

This Court has jurisdiction to review the judgment of the Appellate Court by writ of certiorari because a Federal constitutional right is claimed by petitioner. (28 U.S.C. § 1254(3).)

QUESTIONS PRESENTED

I

Whether a citizen's letter to the Chief of Police, mistakenly—but in good faith—implying that two police officers had solicited a bribe, is constitutionally privileged under the doctrine of *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964) and *Garrison* v. *Louisiana,* 379 U.S. 64 (1964).

II

Whether the Appellate Court's determination that petitioner's right to object to erroneous jury instructions on the basis of *Times* and *Garrison* was waived because not properly raised in the trial court is an adequate State procedural ground serving a legitimate State interest which bars review by this Court even though (a) *there was no intentional waiver* because counsel was not aware that *Times* had been decided three months before trial, (b) the jury instructions were in accordance with prevailing Illinois law in qualified privilege cases, defining actual malice

as ill will, and (c) it was not until *Garrison* was decided, *five months after trial,* that ill will was eliminated as a constitutionally appropriate definition of actual malice.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States:

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE HEART OF THE MATTER

Acting under the mistaken—but honest—belief that two policemen (later identified as respondents) had solicited a bribe from his daughter when a car in which she was riding was stopped for speeding, petitioner wrote an accusing letter to the Chief of Police which triggered an investigation that embarrassed respondents even though their innocence was established.

Under Illinois libel law, petitioner's letter was qualifiedly privileged (absent a showing of actual malice), since it was *from* a citizen having a moral duty to report apparent police irregularities *to* a commanding officer having a duty to investigate such reports. But Illinois, like other states with a qualified privilege rule, defined actual malice as ill will or intent to injure and allowed this to be inferred from such circumstantial evidence as the language of the defamatory statement itself or the writer's negligent failure to ascertain the truth. The jury was instructed accordingly and awarded each respondent $10,000 damages.

The trial was held three months after this Court's decision in the *New York Times* case established that the Federal Constitution protects defamatory criticism of public officials unless made with actual malice, but five months before this Court's decision in the *Garrison* case established that neither ill will nor negligent failure to ascertain the truth was sufficient to meet the constitutional definition of actual malice and that only knowledge or reckless disregard of falsity would suffice.

Being unaware of the *Times* decision, petitioner's trial counsel did not raise a constitutional objection to the jury instructions, though he did bring the *Times* case to the Trial Judge's attention at the hearing on his post-trial mo-

tion for judgment notwithstanding the verdict, which was denied without opinion.

The Illinois Appellate Court refused to consider petitioner's claim that the ill will and negligence instructions were constitutionally defective under *Times* and *Garrison*, holding that the constitutional issue had been waived by counsel's failure to object at trial.

Certiorari should be granted because this case presents important Federal questions—both substantive and procedural—not previously decided by this Court.

On the merits, there is an opportunity to clarify the meaning of the "public official" designation by holding that it has a relative, not an absolute, meaning, depending on the function to be served by granting constitutional protection to the criticism involved. This case presents an ideal factual setting for the development of this concept because it juxtaposes the most innocuous type of defamatory criticism (a private letter to a superior officer) and a lower rank of government employee (policemen on the beat).

Procedurally, there is an opportunity to clarify the impact of the new constitutional protection on cases which were pending while the *Times* and *Garrison* concepts were being developed.[1] Where there has been no intentional waiver of a known constitutional right, the appellate courts should not be allowed to nullify the effect of *Times* and *Garrison* by declaring procedural forfeitures which are not

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[1] The *Butts* case, argued before this Court but not yet decided, involves the waiver question where the trial was held before *Times* was decided but defense counsel were aware of the constitutional argument being advanced in *Times*; whereas, in this case, the trial was held shortly after *Times*, but before *Garrison*, and trial counsel was not aware of *Times* and its implications.

required under State law and which serve no legitimate State interest.

This is such a case, for there is no waiver under Illinois law where a complaint is wholly defective to state a cause of action or where a trial defect is revealed by a post-trial change in the applicable law, and either *Times* rendered respondents' complaint fatally defective for failure to allege knowledge or reckless disregard of falsity or *Garrison* was a post-trial change in the law which revealed the fundamental defects in the trial court's ill will and negligence instructions.

Even if there had been a technical waiver under Illinois law, this Court may nevertheless consider the merits because the Appellate Court itself had discretion to ignore the waiver under the Illinois rule that errors so substantial as to amount to the denial of a fair trial may be raised for the first time on appeal.

Finally, even if there was a waiver which the Appellate Court had no discretion to ignore, the application of the waiver doctrine in this particular case serves no legitimate State interest to preclude this Court from considering the constitutional question. Since recognition of petitioner's constitutional privilege—either by the Trial Judge on the post-trial motion or by the Appellate Court—would have required dismissal of the suit without a new trial, orderly judicial procedure is not prejudiced by allowing the constitutional question to be raised after the trial, in view of counsel's understandable ignorance of *Times* at the time of trial.

STATEMENT

In July of 1958, petitioner, in helping his 19-year-old daughter, Dorothy, balance her bank statement, came across a check for $15 made out to "Cash" and bearing no endorsement except the stamped name of a bar on North Clark Street in Chicago. (R. 28, 35, 65.)[2]

When petitioner asked Dorothy what she was doing in the tavern, she explained that this was a check she had given to a policeman in payment of a "fine" when she and two friends were stopped for speeding on the Outer Drive. Pressed for details, Dorothy told her father that the fine was actually $25, but the driver of the car, Paul Power, had only $10, so Dorothy had written a check for $15 to make up the difference and made it payable to "Cash" at the policeman's request. (R. 28-29, 35-36, 45-46.)

Knowing that traffic fines are not collected on the street and feeling that the circumstances under which the check was given and the fact that it was cashed without personal endorsement were highly suspicious, petitioner called the third occupant of the car, Sue Owens, to find out what she knew about the incident and Sue confirmed Dorothy's story. (R. 29, 40-42, 46, 48.)

Petitioner also tried to contact Paul Power, the driver, but found that he was spending the summer at a ranch in a remote area in the Canadian Northwest and could not be reached by telephone or telegraph. (R. 29, 46.)

Believing that the police had solicited a bribe and that it was his duty to inform the proper authorities promptly, petitioner wrote the following letter (R. 30-31, 33, 46-49, 61):

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[2] Record references are to the Abstract of Record, printed for the use of the court below. Nine copies of the printed Abstract and Supplemental Abstract have been filed in this Court pursuant to paragraph 4 of Rule 21.

July 21, 1958

Chief George Otlewis
Police Division
Chicago Park District
Administrative Building
425 East 14th Blvd.
Chicago 5, Illinois

Prior to noon on March 23rd, on the outer drive, the officers driving police car # 920, license # M7716,[3] solicited a check from my daughter, a copy of which is enclosed, when the car in which she was riding was stopped for "speeding". When she asked the officers to whom the check should be made, they said, "cash what else". The check was pre-dated March 22nd because the 23rd was a Sunday. Further, this solicitation was done in front of witnesses.

I regret having to advise you of this situation at such a late date, but you will note that the check was not put through the bank until the 31st, and since my daughter is away at school, and we just recently returned from a trip to Hawaii, there was no opportunity to present this matter until now. I expect disciplinary action to be taken promptly.

The newspapers have not been advised, and I have no intentions at the present time of doing so.

A. C. Allyn, Jr. (signed)

Chief Otlewis initiated an investigation which soon revealed that, instead of taking a bribe, the policemen (respondents here) had actually done a favor for the three young people by personally cashing Dorothy's check so the

[3] Petitioner did not know the names of the policemen; however, he obtained the police car number and license number from his daughter, who had jotted it down on the blotter in her checkbook when she wrote the check. (R. 40, 41, 47.)

driver could post a cash bond and not have to spend the night in jail. (R. 14-15, 17-18, 21, 23, 67.)

Respondents sued petitioner for libel. At the first trial, the Judge ruled that petitioner's letter was libelous *per se* and submitted the case to the jury on the question of damages only. However, the jury's award of $1,400 actual damages and $100 exemplary damages to each respondent was reversed by the Appellate Court of Illinois, on the first appeal, on the theory that, since petitioner was merely performing "his moral duty to report apparent irregularities in the conduct of the local law enforcement officers" and since "The communication was directed to the proper party" (the police chief), whose responsibility it is to investigate such matters, the letter was "qualifiedly privileged" and there could be no liability without a showing of "actual malice," an issue which should have been submitted to the jury. *Flannery* v. *Allyn,* 47 Ill. App. 2d 308, 309, 318-319 (1st Dist. 1964).

At the second trial, on June 16 through 19, 1964, the Judge instructed the jury that actual malice "means ill will towards a particular person, an actual intention to injure or defame him" and that actual malice could be established by such circumstantial evidence as "failure to make a proper investigation, ill will, mode and extent of publication and falsity." (R. 58-59, 62.) These were proper instructions under the Illinois law concerning qualifiedly privileged communications. (App. Ct. Op., App. 38-39.) Indeed, petitioner's trial counsel, John T. Garrity, had requested the ill will instruction and, while he did object to the circumstantial evidence and negligence instructions, he did not do so on constitutional grounds. (R. 49.) He was not aware that, in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, decided on March 9, 1964, three months before the trial, this

Court had given constitutional protection to defamatory criticism of public officials. (App. 36, 48.)

The jury awarded $10,000 damages to each respondent. (R. 7-9.)

On July 15, 1964, petitioner filed a post-trial motion for judgment notwithstanding the verdict or for a new trial, complaining of a violation of his constitutional rights and renewing his objections to the circumstantial evidence and negligence instructions. (R. 9-12, ¶¶ 3, 9, 10.)

On October 14, 1964, as shown by an affidavit of counsel which the Appellate Court refused to allow to be filed (reproduced in the Appendix), the Trial Judge heard oral argument in chambers on petitioner's post-trial motion, at which time petitioner's trial counsel called the Judge's attention to the *Times* case and, at the close of the argument, the Judge asked for and received a copy of the *Times* case. (Certified Record, p. 506; App. 48.)

On October 19, 1964, the Trial Judge overruled petitioner's post-trial motion, without stating reasons. (R. 12.)

On appeal, petitioner argued that both the ill will and negligence instructions were erroneous under the *Times* rule, as clarified and significantly enlarged by *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), which was decided five months *after* the trial in the case at bar. But the Appellate Court refused to consider the impact of *Times* and *Garrison*, holding that petitioner had waived his right to object to the instructions on constitutional grounds because of his trial counsel's failure to raise the constitutional question in the trial court. (App. Ct. Op., App. 41-43.)

REASONS FOR GRANTING THE WRIT

I

WHETHER PETITIONER'S LETTER WAS CONSTITUTIONALLY PRIVILEGED IS A SUBSTANTIAL FEDERAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT

The Guidelines Announced by the Court Have Not Resolved Whether Policemen Are "Public Officials" Under the *Times* Rule

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), this Court held that the Constitution delimits a State's power to award damages for libel in actions brought by *public officials* against critics of their *official conduct*. But the Court specifically left open for future consideration the precise extent of the "public officials" category and the "official conduct" concept (376 U.S. 254, 283, n. 23):

> We have no occasion here to determine how far down into the lower ranks of government employees the "public official" designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Cf. *Barr* v. *Matteo*, 360 U.S. 564, 573-575. Nor need we here determine the boundaries of the "official conduct" concept.

Similarly, in *Rosenblatt* v. *Baer*, 383 U.S. 75, 85-87 (1966), the Court declined to announce a precise definition of a "public official," commenting that the designation surely

> • • • applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs, • • •

but that it might not apply to a lesser Government employee unless his position is

> * * * one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy.

Whether these respondents are "public officials" under these guidelines—or, indeed, whether these guidelines are to be taken as definitive—is a novel question. On the one hand, it could be argued that respondents were merely ordinary policemen and, therefore, similar to the night watchman accused of stealing state secrets who was posited in *Rosenblatt* as an example of a Government employee who would not be considered a "public official" because his position was not one which would invite public scrutiny apart from the particular charges in controversy. 383 U.S. at 87, n. 13.

On the other hand, it could be argued that, precisely because respondents *are* ordinary policemen, exercising the most basic of all governmental powers in direct and constant contact with the public, criticism of their official integrity is necessarily protected by the *Times* rule. By its very nature, abuse of power by the police is difficult to discover and correct. All too often, the citizen-victim is either afraid or unwilling to speak out. Thus, the *only* effective deterrent to police corruption is an alert and articulate citizenry, uninhibited from reporting apparent police misconduct by the threat of libel suits.

Curiously enough, the policy which favors unbridled criticism of the official conduct of those who exercise the police power was given a most eloquent exposition by the same appellate court which refused to enforce the policy in this case. On the first appeal, the Court said (*Flannery* v. *Allyn*, 47 Ill. App. 2d 308, 319 (1st Dist. 1964)):

> The defendant had an interest, as does every citizen, in the maintenance of an efficient Police Department, free from corruption. The defendant did not know the facts at the time he wrote the letter, but believed that the plaintiffs had solicited a bribe and were derelict in their duty, and under these circumstances it could be said that it was his moral duty to report apparent irregularities in the conduct of the local law enforcement officers. The communication was directed to the proper party, one having a duty or interest corresponding to that of the defendant. It is the responsibility of the Police Chief to investigate instances of apparent misconduct by his subordinates and to take appropriate disciplinary action where necessary.

No Court Has Considered the Scope of the *Times* Privilege in the Context of a Private Communication to a Government Employee's Superior Officer

Whether this policy is strong enough to bring the policeman on the beat within the ambit of *Times* is itself enough to warrant consideration by the Court. But, in addition, this case presents the "public official" question in the unique context of a *private* communication to a superior officer complaining of apparent police corruption, rather than a widely disseminated *public* criticism, such as the newspaper advertisement involved in *Times* itself or the kinds of publications involved in the few cases decided by lower courts since *Times* which have held that policemen *are* public officials within the meaning of *Times*. For example, *Pape* v. *Time, Inc.*, 354 F. 2d 558 (7th Cir. 1965), certiorari denied, 384 U.S. 909 (1966), involved a statement in Time magazine that a Chicago police lieutenant was guilty of police brutality; *Gilligan* v. *King*, 264 Misc. 2d 212

(N.Y. S.Ct. 1965), involved posters accusing a New York police lieutenant, who shot a Negro boy in self-defense, of murder; and *Arscott* v. *Washington Post* (D.C.D.C. Civil No. 1025-61, decided May 20, 1964, but unreported), involved a newspaper editorial accusing three plainclothes policemen of homosexuality.

The factual context in which the "public official" question is presented is all-important, for the term should not be given an absolute definition. Rather, as the Court suggested in *Rosenblatt* v. *Baer*, 383 U.S. 75, 85, n. 10 (1966), "the scope of the privilege is to be determined by reference to the functions it serves." For example, scathing *newspaper* criticism of an ordinary policeman or a watchman in a government building may call for a different definition of the term "public official" than a simple *letter* of complaint to his superior; and yet none of the cases decided since *Times* has afforded an opportunity for this kind of analysis.

The Court Has Not Ruled on the Impact of *Times* on the Law of States Which Already Had a Qualified Privilege for Private Communications to a Superior Officer

Finally, this case squarely presents the question of the impact of *Times* on the law of those States, such as Illinois, which already had a qualified-privilege rule requiring proof of "actual malice" for private defamatory communications criticizing the way in which a governmental employee has performed his duties. Are such communications now privileged by the Federal Constitution as well as under State law and, if so, has the *Garrison* v. *Louisiana*, 379 U.S. 64, 78-79 (1964), definition of actual malice to mean knowledge

or reckless disregard of falsity displaced the former ill will-intent to injure standard?

To summarize: At issue here is the nature and scope of the constitutional protection to be accorded a citizen who in good faith dares to criticize the integrity of governmental employees in the performance of their duties—not in a dramatic-civil-rights or burning-public-issue context, but in the context of a common citizen's concern about an apparent abuse of police power. This Court has not yet come to grips with this problem.

II

THE PROCEDURAL FORFEITURE INVOKED BY THE APPELLATE COURT DOES NOT PRECLUDE REVIEW OF THE CONSTITUTIONAL ISSUE BY THIS COURT

In *Henry* v. *Mississippi*, 379 U.S. 443, 446-447 (1965), this Court said that despite the familiar principle that this Court will decline to review State court judgments which rest on independent and adequate state grounds, where a State court judgment rests on a purely *procedural* ground,

> * * * we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question.

For the purpose of determining whether a State procedural rule which prohibits the raising of Federal questions at late stages in a case precludes review of substantial Federal questions by this Court, two principles have been established:

> (1) Where the application of the procedural rule is not mandatory, but rather is discretionary with the State courts—

> * * * we are not concluded [sic] from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right. A state court may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing upon kindred issues raised in the same manner. (*Williams* v. *Georgia*, 349 U.S. 375, 383 (1955); footnote omitted.)

(2) Even where the application of the State procedural rule is mandatory—

> * * * a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights. (*Henry* v. *Mississippi*, 379 U.S. 443, 447-448 (1965); footnote omitted.)

In this case, there are three grounds to support this Court's jurisdiction to review the denial of petitioner's constitutional rights:

(1) The Appellate Court erred in finding that petitioner's constitutional rights have been waived, as a matter of Illinois law, because

(a) A failure to object at trial to instructions rendered erroneous by a subsequent change in the applicable law does not constitute a waiver;

(b) The complaint fails to state a cause

of action and may, therefore, be challenged at any time; and

(c) The constitutional issue was timely raised by petitioner's post-trial motion.

(2) Even if the constitutional question was not timely raised, the Appellate Court nevertheless had discretion to ignore the procedural defect and review the merits.

(3) Even if there was a waiver which the Appellate Court had no discretion to ignore, the enforcement of the procedural forfeiture in this case serves no legitimate State interest.

There Was No Waiver Under Illinois Law

While it is generally true that defenses (including constitutional arguments) not presented to the trial court are waived (App. 41),[4] there are certain well recognized exceptions to the general rule which the Appellate Court completely and unjustifiably ignored.

Failure to Object to the Trial Court's Ill Will Instructions in Anticipation of Garrison *Cannot Constitute a Waiver.*

One of these exceptions is that trial defects revealed by

[4] Although we do not question the Appellate Court's statement of the general rule, it should be noted that the *Pennsylvania Railroad, Department of Public Works, Zelney,* and *Lipsky* cases relied on by the Appellate Court (App. 41-43) are not pertinent. They were all decided prior to the inception of a whole new judicial procedure on January 1, 1964 (Ill. Const. Art. VI) and were based on the former procedure under which the Illinois Supreme Court had direct appeal jurisdiction in cases involving constitutional questions—but only if the record affirmatively showed that the constitutional question had been presented to *and* passed on by the trial court.

post-trial changes in the applicable law may be raised for the first time on appeal. *City of Chicago* v. *Kimmel,* 31 Ill. 2d 202, 207-209 (1964); *The People* v. *Bruce,* 31 Ill. 2d 459, 460-461 (1964); *People* v. *Rhodes,* 71 Ill. App. 2d 150 (4th Dist. 1966).

This, of course, is in accord with the Federal rule that no waiver of rights results from a failure to make an objection at trial in anticipation of a doctrine later announced by this Court. *O'Connor* v. *Ohio,* 385 U.S. 92 (1966); *Hormel* v. *Helvering,* 312 U.S. 552 (1941); *Uebersee Finanz-Korp.* v. *McGrath,* 343 U.S. 205 (1952).

While *Times* established that criticism of public officials is constitutionally privileged, absent a showing of actual malice, it was not until *five months after the trial in this case* that this Court held that neither ill will nor negligence could constitute actual malice in the constitutional sense. *Garrison* v. *Louisiana,* 379 U.S. 64, 73-74, 79 (1964).

In holding that ill will and negligence instructions strikingly similar to those given in this case were clearly improper, this Court cites Garrison *not* Times. *Rosenblatt* v. *Baer,* 383 U.S. 75, 83-84 (1966).

Even the Appellate Court in this case seems to recognize that it was *Garrison* that wrought the change in the definition of actual malice:

> A *later* United States Supreme Court decision, Garrison v. Louisiana, 379 U.S. 64, held that neither intent to injure nor lack of due care was sufficient to meet the constitutional test of the *Times* case, and that only an intent to injure through the calculated use of a falsehood or the reckless disregard of truth would destroy the constitutional protection. (App. 35-36; emphasis supplied.)

Moreover, the *Garrison* result was by no means predictably clear from the *Times* opinion. In *Times* the Court rejected an Alabama rule that truth was the only defense in a case of libel *per se,* holding that where a public official is involved the mere falsity of a defamatory advertisement printed by the New York Times was not enough and that either knowledge or reckless disregard of falsity must be established. *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 279-280 (1964). Whether proof of ill will would also suffice was not before the Court and was not discussed, for there was no element of personal animosity in the case. Thus, as a matter of *stare decisis, Times* only stood for the proposition that, in order to hold a newspaper liable for merely printing a false and defamatory advertisement, a showing of knowledge or reckless disregard of falsity was required.

Furthermore, the *Times* opinion discussed, approvingly, *Coleman* v. *MacLennan,* 78 Kan. 711 (1908), as announcing a rule similar to that adopted by the Court in *Times;* and yet *Coleman* had applied the classic State court ill will definition of actual malice—the natural inference being that the Court approved of that definition. Indeed, subsequent to *Times,* the highest courts in two States ruled that, because of this, *Times* had not altered their previous ill will concept of actual malice. *Kennedy* v. *Mid-Continent Telecasting, Inc.,* 193 Kan. 544 (1964); *Baer* v. *Rosenblatt,* 106 N.H. 26 (1964), reversed, 383 U.S. 75 (1966).

Since it was really *Garrison* that eliminated ill will as a test of actual malice in cases where the constitutional protection of *Times* applies, the failure of petitioner's counsel to object at trial to ill will instructions which were proper under existing Illinois law cannot constitute a waiver. Rather, the post-trial change in the applicable constitutional standard for proving actual malice completely justified raising the point for the first time on appeal under Illinois law, as well as under Federal law.

The Complaint Fails to State a Cause of Action and May, Therefore, Be Challenged at Any Time.

Even if it had been clear, at the time of trial, that *Times* itself had abolished ill will as a constitutionally permissible definition of actual malice, petitioner was not precluded from asserting his constitutional rights for the first time on appeal because of the Illinois rule that *the total failure of a complaint to state a cause of action can be raised at any time. Wilson* v. *Board of Education,* 394 Ill. 197, 201 (1946); *Gustafson* v. *Consumers Sales Agency,* 414 Ill. 235, 241 (1953); *Grizzard* v. *Matthew Chevrolet,* 39 Ill. App. 2d 9, 17 (4th Dist. 1963). The rule was concisely stated in *Wagner* v. *Kepler,* 411 Ill. 368, 371 (1951):

> While defects in a complaint containing an incomplete or otherwise insufficient statement of a good cause of action may be waived, the question of whether a complaint absolutely fails to state or indicate any ground of liability which the law will recognize can be raised at any time.

The complaint in this case does not allege that petitioner's letter was written with knowledge or reckless disregard of falsity; it merely alleges, generally, that petitioner acted "maliciously," intending to destroy respondents' good reputations (R. 2, ¶ 5)—and a general allegation that a defendant was motivated by malice is no longer sufficient to state a cause of action if the letter is constitutionally privileged under *Times* and *Garrison. Lundstrom* v. *Winnebago Newspapers, Inc.,* 58 Ill. App. 2d 33, 36 (2d Dist. 1965); *Proesel* v. *Myers Pub. Co.,* 48 Ill. App. 2d 402, 405 (1st Dist. 1964); *Cabin* v. *Community Newspapers, Inc.,* 50 Misc. 2d 574 (N.Y. S.Ct. 1966).

To summarize: If, as a matter of substantive law, petitioner's letter is constitutionally privileged because respond-

ents are "public officials," he has not waived the privilege because either *Times* itself rendered the complaint utterly defective to state a cause of action or *Garrison* effected a significant post-trial change in the applicable law. In either case, under Illinois law, the defect can be raised for the first time on appeal.

The Error in the Negligence Instructions Was Properly Preserved for Appeal.

It will be recalled that the instructions which permitted the jury to infer actual malice from such circumstantial evidence as failure to make a proper investigation were objected to at the conference on instructions, though not on constitutional grounds. (R. 49,58-59, Instructions 4 and 7.) In the post-trial motion, the objection to these instructions was renewed and an objection to the denial of petitioner's constitutional rights was made, though the two objections were not specifically related and the constitutional argument was not articulated. *However, as shown by the affidavit of counsel, the* Times *case was specifically called to the trial court's attention during the unreported hearing on the post-trial motion.* (App. 48.)

Under these circumstances, the constitutional defects in the negligence instructions were properly raised in the trial court and preserved for appeal. The Illinois courts have held that in order to object to erroneous instructions on appeal it is only necessary that they be objected to in the conference on instructions and objected to, by number, in the post-trial motion. *Pajak* v. *Mamsch,* 338 Ill. App. 337, 343-346 (1st Dist. 1949); *Chism* v. *Decatur Newspapers, Inc.,* 340 Ill. App. 42, 47 (3d Dist. 1950); *Rudolph* v. *City of Chicago,* 2 Ill. App. 2d 370, 374-375 (1st Dist. 1954); *Goodman* v. *Motor Products Corp.,* 22 Ill. App. 2d 378, 386-387 (2d Dist. 1959).

Moreover, there is no requirement that the grounds for objection be articulated or that the cases relied upon be cited. In *Tabor* v. *Tazewell Service Co.*, 18 Ill. App. 2d 593 (3d Dist. 1958), the court rejected a contention that the propriety of certain jury instructions was not properly preserved for appellate review because they were merely identified by number in the post-trial motion and no grounds in support of the objections were stated. The court said (18 Ill. App. 2d at 601):

> While a post trial motion must specify the errors relied upon, it need not be a brief or argument.

Even if an elaboration of the claim of denial of petitioner's constitutional rights was required, it was supplied by the argument on the post-trial motion. The fact that the argument was not reported, and, therefore, is not a part of the official record, is not material, for affidavits may be used to supply significant facts which are outside the record. *Williams* v. *Georgia*, 349 U.S. 375, 379-380 (1955); *Henry* v. *Mississippi*, 379 U.S. 443, 450 (1965); *Curtis Publishing Co.* v. *Butts*, 351 F.2d 702, 733 (5th Cir. 1965), certiorari granted, 385 U.S. 811 (1966).

The Appellate Court Had Discretion to Review the Merits Regardless of a Technical Waiver

In order to mitigate the harshness of the general waiver rule in particular cases, the Illinois courts have a residual discretionary power to consider assignments of error for the first time on appeal where necessary to insure a fair trial. In *Belfield* v. *Coop*, 8 Ill. 2d 293, 313 (1956), the Court said:

> If prejudicial arguments are made without objection of counsel or interference of the trial court to the extent that the parties litigant cannot receive a

> fair trial and the judicial process stand without deterioration, then upon review this court may consider such assignments of error, even though no objection was made and no ruling made or preserved thereon.

See, also, *City of Chicago* v. *Pridmore,* 12 Ill. 2d 447, 453 (1957); *City of Quincy* v. *Best Supply Co.,* 17 Ill. 2d. 570, 577 (1959); *Muscarello* v. *Peterson,* 20 Ill. 2d 548, 555 (1960); *Underwood* v. *Pennsylvania Ry. Co.,* 34 Ill. 2d 367, 371 (1955).

While these cases all involved improper conduct of counsel, there is nothing to indicate that the Illinois courts do not have similar discretion to ignore the waiver rule whenever necessary to correct an error so egregious as to deprive a party of a fair trial. Indeed, the waiver rule has been ignored in a case which is closely analogous to the case at bar. In *People* v. *Bender,* 20 Ill. 2d 45, 54 (1960), the Court held that the fair trial exception to the waiver rule applied to erroneous instructions, even though (as in this case) the appellant himself had requested some of the instructions:

> The State further contends that some of the erroneous instructions were given at the request of defendant and that he is therefore in no position to complain. While such a rule is normally applicable in cases involving mere error, it will not operate to deprive an accused of his constitutional right to due process of law. (Cf. *People* v. *Burson,* 11 Ill.2d 360, 370.) When the State, the defense, and the court, all proceeded on an entirely erroneous belief that the burden of establishing insanity rested upon the defendant, it was impossible for the defendant to receive a fair and impartial trial according to the law of this State.

Here, as in *Bender*, the trial court's instructions were based upon a fundamental misconception, by both court and counsel, of the applicable law. Because of *Times* and *Garrison*, the only issue was whether petitioner's bribery accusation was made with knowledge or reckless disregard of falsity; and yet the jury was told that the issue was whether petitioner wrote his letter out of ill will, intending to injure respondents—a state of mind which could be inferred from negligence in investigating the facts, the mere falsity of the accusation, and the language of the letter. (R. 58-59, 62.)

Just how improper these instructions were—and how greatly they deviated from the *Times-Garrison* rule—is illustrated by the fact that *petitioner was found guilty of having written his letter with actual malice, even though he did not even know respondents and had no reason to bear them any personal animosity.*

In order to affirm the verdict, even under the pre-*Times* ill will rule, the Appellate Court had to grasp at language in the letter which merely reflected petitioner's mistaken, *but honest*, belief that two nameless police officers had solicited a bribe and should be disciplined accordingly. (App. Ct. Op., App. 45-47.)

That petitioner did not have a fair trial because of these grossly erroneous instructions is illustrated by the fact that the jury awarded "compensatory" damages of $10,000 to each respondent simply because, in the words of the Appellate Court (App. 34):

> The evidence in this case showed that it was common knowledge at the North Park Station that plaintiffs had been accused of taking a bribe, and they were shunned by their fellow officers and the wives of their fellow officers, which caused them considerable mental anguish. This despite the fact that they were completely exonerated.

One wonders how much these verdicts were influenced by the fact that respondents' counsel was allowed to show that petitioner was a partner in the investment firm of Francis I. du Pont and President of a holding company which owns the Chicago White Sox and the jury was instructed that they could consider petitioner's wealth in fixing the amount of damages. (R. 33, 59-60.)

Under the circumstances, the trial court's instructions were so erroneous as to constitute substantial error which the Appellate Court had discretion to correct under the fair trial exception to the waiver rule.

The Appellate Court's Application of the Waiver Doctrine Served No Legitimate State Interest

Even if this were a case of waiver which the Appellate Court had no discretion to excuse, review of the constitutional issue by this Court is not barred because, under the rule established by *Henry* v. *Mississippi*, 379 U.S. 443, 447-448 (1965), the Appellate Court's insistence on a procedural forfeiture does not serve any legitimate State interest.

The State admittedly has an interest in precluding a litigant from trying his case twice on different theories and in protecting its appellate courts from having to pass on arguments not presented to the trial court. *But that interest is not served by declaring a forfeiture of a substantial Federal right because of the understandable failure of petitioner's counsel to raise the constitutional issue at trial.*

This is not a case where, for reasons of trial strategy, counsel chose not to raise the constitutional issue. *It is a case where a lawyer practicing in the Chicago Municipal*

Court simply was not aware that his client's letter may have been clothed with a Federal, as well as a State, privilege because of a Supreme Court decision handed down three months before trial.[5]

And even if he could be charged with negligence for not having noticed the *Times* case, though it surely could not have been discovered through the normal research procedure at that early a date, *would he also have been expected to be sufficiently clairvoyant to foresee that* Garrison *would later announce a standard for proving actual malice which was different from the classic ill will definition impliedly approved by* Times?

Under these circumstances, where there is no *intentional* relinquishment of a *known* right or privilege and no "deliberate by-passing of state procedures" (*Fay* v. *Noia*, 372 U.S. 391, 438-439 (1963)), no legitimate state interest is served by insisting on a procedural forfeiture.

By the time of the conference on instructions, respondents had presented all of their evidence on actual malice and had rested their case, so they could not have been prejudiced in the presentation of their case by petitioner's failure to object at that time.

Moreover, *Times* was brought to the Trial Judge's attention in the argument on petitioner's post-trial motion, while

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[5] Although the Appellate Court cites *Curtis Publishing Co.* v. *Butts*, 351 F.2d 702 (5th Cir. 1965), certiorari granted, 385 U.S. 811 (1966), in the course of its discussion of the waiver issue (App. 42), *Butts* is totally inapplicable here, for the Fifth Circuit's ruling was based on the premise that, because Curtis was represented by the same eminent counsel who represented the New York Times in the *Times* case, there was an *intentional* relinquishment of a *known* right or privilege. No such conscious waiver is present here because even the Appellate Court recognized that petitioner's trial counsel was not aware of *Times*. (App. 36.)

he still had control of the case and could have rendered judgment notwithstanding the verdict because there was no evidence that petitioner's letter was written with knowledge or reckless disregard of falsity.

Finally, even at the appellate level, recognition of petitioner's constitutional rights would not have raised the spectre of a new trial because the Appellate Court was required to review the evidence in the record to determine whether it could constitutionally support a judgment for respondents and (if it could not) to reverse, *without remand,* for lack of evidence that the statements in petitioner's letter were made with the "high degree of awareness of their probable falsity" required by *Garrison, New York Times Co.* v. *Sullivan,* 376 U.S. 254, 284 (1964); *Garrison* v. *Louisiana,* 379 U.S. 64, 74 (1964).

The propriety of this procedure has been recognized by the Illinois Supreme Court in the closely analogous situation of a change in the constitutional standard for judging obscenity made by a decision of this Court after trial. *People* v. *Bruce,* 31 Ill. 2d 459 (1964); *City of Chicago* v. *Kimmel,* 31 Ill. 2d 202, 207-208 (1964).

Thus, neither respect for orderly judicial process nor avoiding prejudice to respondents demands a forfeiture of petitioner's constitutional rights in this case.

Respectfully submitted,

THOMAS R. MULROY
EDWARD W. ROTHE
Counsel for Petitioner

HOPKINS, SUTTER, OWEN, MULROY, WENTZ & DAVIS
One North La Salle Street
Chicago, Illinois 60602